IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. DONALD ROY NAIL, Petitioner.	)	2 CA-CR 2006-0406-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20002544

Honorable Frank Dawley, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Robert J. Hooker, Pima County Public Defender
By John F. Palumbo
Tucson
Attorneys for Petitioner

P E L A N D E R, Chief Judge.

¶1 Donald Roy Nail was convicted after a trial of five counts of sexual conduct with a minor under the age of fifteen, two counts of child molestation, and one count each of sexual abuse of a minor under the age of fifteen, furnishing obscene or harmful items to minors, and public sexual indecency to a minor under the age of fifteen. The trial court

sentenced him to consecutive, presumptive prison terms totaling 143 years. This court affirmed the convictions and sentences on appeal. *State v. Nail*, No. 2 CA-CR 2002-0200 (memorandum decision filed Nov. 7, 2003). Nail now seeks relief from the trial court's summary denial of post-conviction relief, which he requested pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. We review for an abuse of discretion a trial court's ruling on a petition for post-conviction relief, *State v. Decenzo*, 199 Ariz. 355, ¶ 2, 18 P.3d 149, 150 (App. 2001), and find no abuse here.

¶2 Nail contends his trial counsel was ineffective because he failed to object to the admission of other act evidence, a failure Nail argues was extremely prejudicial to his defense. To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional standards and that counsel's deficient performance resulted in prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). If a defendant fails to state a colorable claim on one requirement, a court need not examine the other. *State v. Salazar*, 173 Ariz. 399, 414, 844 P.2d 566, 581 (1992).

¶3 According to Nail, he was originally charged with twenty-three dangerous crimes against children involving four victims, C., M., H., and J., plus two other offenses. C., M., and H. are Nail's nieces, and J. was a neighbor. Prior to his first trial, the court dismissed three continuous sexual abuse charges as duplicitous. On the second day of trial,

the court dismissed without prejudice all four counts in which M. was named as the victim. That trial ended in a mistrial. At his second trial, the court granted Nail's motion for judgment of acquittal on three counts, and the jury was unable to reach a verdict on all four counts in which H. was named as the victim and one in which C. was the alleged victim. As a result, Nail's five convictions for sexual conduct with a minor include three involving J. and two involving C. One child molestation conviction involved J.; the other molestation count and the sexual abuse of a minor count involved C. Nail's conviction for furnishing obscene items to a minor involved C., and the public sexual indecency conviction involved J. and/or C.

¶4 Nail complained that, despite the trial court's dismissal of the counts involving M., his attorney was ineffective in failing to object to the state's introduction of testimony about the acts charged in the dismissed counts. Although counsel did not object, the trial court nevertheless gave the jury a limiting instruction on the evidence, telling them they could consider it in relation to Nail's "motive, intent, plan or knowledge." In denying relief on Nail's post-conviction claim, the trial court ruled Nail had suffered no prejudice from counsel's failure to object because the evidence would have been admitted even if counsel had objected. The court found the evidence related to M. was properly admitted because the acts were "intrinsically involved with the offenses charged in the indictment" and the evidence of acts that had not been charged at all was admissible "to define the relationship

between the defendant and his nieces and to complete the story of the charged conduct." Nail challenges those rulings on review.

¶5 We first note that a number of the pages of trial testimony Nail cites as containing improperly admitted other acts evidence introduced by the state are actually pages in which defense counsel cross-examined a witness. Because Nail did not acknowledge that fact or distinguish testimony presented on direct examination from that presented on cross-examination, we do not address any of the testimony contained in those pages.

¶6 We are unable to address Nail's complaint that J. testified about other acts involving M. Pursuant to the parties' stipulation, the state played J.'s videotaped deposition for the jury. But that videotape was neither transcribed by the court reporter nor admitted into evidence, and Nail has not included the videotape in the record on review. Finally, we do not address Nail's complaints about the prior act testimony of H. Because the jury was unable to reach a verdict on all the counts in which H. was named a victim and because Nail did not assert the testimony had any effect on the offenses of which he was found guilty, Nail is unable to show how he was prejudiced by the admission of that testimony. Therefore, the trial court did not abuse its discretion in denying post-conviction relief on that claim. *See Salazar*, 173 Ariz. at 414, 844 P.2d at 581.

¶7 Accordingly, we address only Nail's challenge on review to other act testimony related to the dismissed charges in which M. was the named victim or to charges

never filed that the state introduced in examining C. Of his specific cites, the first does not, as he asserts, contain testimony about a dismissed charge relating to M.; it involves only an act Nail committed against C. Although C. initially said M. was present at the time, after further questioning by the prosecutor, she testified M. had been out of the state at that time. Another cite refers to C.'s testimony that Nail had brought a sex toy into the bedroom where she, M., and J. were sleeping and that he had told C. to use it on M. Nail complains the testimony was improperly admitted evidence of an act that had not been charged in the indictment. As he acknowledges, however, the charged act was that Nail had used the toy on C., and the trial court granted a judgment of acquittal on that count, precisely because C.'s testimony was not about the act charged. Therefore, we find no prejudice to Nail.

¶8 Nail also challenged C.'s testimony that he had invited M. and J., as well as C., to his room to watch pornographic videotapes. The charge—furnishing obscene or harmful items to—named only C. as the victim. Nail apparently acknowledges the state's assertion and the trial court's finding that the evidence was "intrinsically involved" with the offenses charged in the indictment and falls within the definition of intrinsic evidence in *State v. Nordstrom*, 200 Ariz. 229, ¶ 56, 25 P.3d 717, 736 (2001), but asserts that definition is "vague and overbroad" under a Seventh Circuit Court of Appeals case. But, because we may not ignore or overrule a decision of our supreme court, *State v. Ofstedahl*, 208 Ariz. 406, ¶ 8, 93 P.3d 1122, 1124 (App. 2004), we do not address that argument. Because C.'s mention that M. was also present when the videotapes were viewed was "'part of "a single

criminal episode"'" under the *Nordstrom* definition, the trial court did not abuse its discretion in rejecting Nail's claim of ineffective assistance of counsel, even though it had instructed the jury at trial that the evidence had been admitted under a different theory. 200 Ariz. 229, ¶ 56, 25 P.3d at 736, *quoting State v. Dickens*, 187 Ariz. 1, 18 n.7, 926 P.2d 468, 485 n.7 (1996).

¶9 Finally, Nail challenges C.'s testimony that he had repeatedly touched her breast and vagina in 1998 and had put his penis into her vagina "more than once" and "several times." The charges involving C. alleged acts Nail had committed in February and July 2000. The trial court found the prior act evidence was properly admitted to complete the story of the conduct charged. We agree with Nail that the evidence did not fall under that exception. *See State v. Alatorre*, 191 Ariz. 208, ¶ 18, 953 P.2d 1261, 1266 (App. 1998) ("The 'complete-the-story' exception to Rule 404(b)[, Ariz. R. Evid., 17A A.R.S.,] applies only when the prior act is 'so connected with the crime of which the defendant is accused that proof of one incident[al]ly involves the other or explains the circumstances of the crime.'"), *quoting State v. Johnson*, 116 Ariz. 399, 400, 569 P.2d 829, 830 (1977).

¶10 Nail nonetheless acknowledged below that the evidence of prior acts involving C. "may arguably have been admissible" as sexual propensity evidence under Rule 404(c), Ariz. R. Evid., 17A A.R.S. But he also pointed out, as he does on review, that a trial court is required to weigh the probative value of such evidence against its prejudicial effect before admitting such evidence and now asserts the trial court here failed twice to engage in that

weighing process. *See State v. Garcia*, 200 Ariz. 471, ¶¶ 29-31, 28 P.3d 327, 332 (App. 2001).

¶11 We disagree. Although the court did not engage in the weighing process at trial because defense counsel did not object to admission of the testimony, the court did address the issue of prejudice in ruling on Nail's post-conviction claims. And it determined the evidence was not unduly prejudicial. The court did so, moreover, after having presided over Nail's trial and observed the testimony as it was presented. Under the circumstances, therefore, we are unable to conclude that trial counsel's objecting to admission of the evidence "might have changed the outcome." *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶12 Accordingly, we grant the petition for review but deny relief.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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GARYE L. VÁSQUEZ, Judge